No. 06-

IN THE

# Supreme Court of the United States

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PHILADELPHIA HOUSING AUTHORITY,
*Petitioner,*

v.

VANESSA HENDERSON, *et al.*,
*Respondents.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in requiring that a district court keep in place in perpetuity a 22-year-old consent decree regulating a government agency, a public housing agency, simply "to hold the parties to their bargain," even though need for a consent decree had been superseded by subsequent federal regulations, there was no history of any noncompliance with the consent decree and the district court which had entered the consent decree concluded that it was no longer necessary?

## LIST OF PARTIES

The plaintiffs in this proceeding are Vanessa Henderson, an individual, as a representative of a class of individual recipients of Section 8 rental assistance from the Philadelphia Housing Authority ("PHA"). The defendants are PHA, a governmental party, and six former PHA officials, Anthony Morrone, Thomas J. Kelly, Jr., Thomas McIntosh, Harry Sewell, Hermine Hart, Carmelita Thill, and Dante Mattioni. No corporate disclosure statement is required because there are no nongovernmental corporations who are a party to this proceeding.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED FOR REVIEW | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS AND ORDERS OF THE COURTS BELOW | 1 |
| STATEMENT OF JURISDICTION | 2 |
| FEDERAL REGULATIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE PETITION | 8 |
| A. The Third Circuit's Decision Requiring A District Court To Regulate A Government Agency In Perpetuity Conflicts With The Decisions Of This Court That Federal Court Regulation Of Government Agencies Must Terminate Once The Need For Court Involvement Has Ceased | 9 |
| B. The Third Circuit's Decision Requiring A District Court To Keep In Place A Consent Decree Which Has Been Superseded By Federal Regulations Conflicts With A Decision Of The Eleventh Circuit On The Same Question | 15 |
| C. The Negative Impact Of The Third Circuit's Decision On State And Local Governments' Ability To Exercise Their Powers And Responsibilities Is Substantial | 18 |
| CONCLUSION | 21 |

TABLE OF CONTENTS—Continued

APPENDICES Page

Appendix A—*Henderson v. Morrone*, No. 05-5317 (3d Cir. January 25, 2007) ..... 1a-10a

Appendix B—Order of the United States District Court, Civil Action No. 79-4190 (E.D. Pa. November 8, 2005) ..... 11a-12a

Appendix C—Order of the Court of Appeals denying PHA's Petition for Rehearing dated February 22, 2007 ..... 13a-14a

Appendix D—United States Department of Housing and Urban Development Regulation 24 C.F.R. § 982.555 ..... 15a-19a

Appendix E—United States District Court Docket Entries in Civil Action No. 79-4190 ..... 20a-23a

Appendix F—Plaintiff's Complaint in Civil Action No. 79-4190 ..... 24a-35a

Appendix G—Order of the United States District Court, Civil Action No. 79-4190, dated April 27, 1983, and attached Consent Decree ..... 36a-43a

Appendix H—Transcript of September 15, 2005 Hearing on Motion to Vacate Consent Decree ..... 44a-75a

# TABLE OF AUTHORITIES

CASES Page

*Alexander v. Britt*, 89 F.3d 194 (4th Cir. 1996)..... 17
*Basham v. Freda*, 805 F. Supp. 930 (M.D. Fla. 1992), *aff'd without op.*, 985 F.2d 579 (11th Cir. 1993)..... 13
*Board of Education v. Dowell*, 498 U.S. 237 (1991).....9, 10, 11, 14, 17
*Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir. 2003)..... 17
*Ellis v. Ritchie*, 803 F. Supp. 1097 (E.D. Va. 1992)..... 13
*Frew v. Hawkins*, 540 U.S. 431 (2004)..... *passim*
*Henderson v. Morrone*, No. 05-5317 (3d Cir. January 25, 2007)..... *passim*
*Hodge v. Department of Housing & Urban Development*, 862 F.2d 859 (11th Cir. 1989).....15, 16, 17
*Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993)..... 17
*Lynch v. Sessions*, 942 F. Supp. 1419 (N.D. Ala. 1996)..... 16
*New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983)..... 16
*Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984)..... 16
*Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).....8, 10, 11, 16, 17
*Vandermark v. Housing Authority of City of York*, 663 F.2d 436 (3d Cir. 1981)..... 13

STATUTES

28 U.S.C. § 1254(1)..... 2
42 U.S.C. § 1437 *et seq.*..... 6
42 U.S.C. § 1437f..... 6

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 1983 ..... 6
35 Pa. Stat. § 1544(a) ..... 6
35 Pa. Stat. § 1550 ..... 6

REGULATIONS

24 C.F.R. § 982.555 ..... *passim*

RULES

Fed R. App. P. 32.1 ..... 18
Third Cir. L.A.R. 28.3 ..... 18

OTHER AUTHORITIES

47 Fed. Reg. 32169 (July 26, 1982) ..... 12
49 Fed. Reg. 12215 (March 29, 1984) ..... 11, 12, 20
Third Cir. Internal Operating Proc. 5.3 ..... 18
Third Cir. Internal Operating Proc. 5.7 ..... 18

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## OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit, No. 05-5317 (3d Cir. January 25, 2007), are unpublished but are reported at 2007 WL 186764 and 2007 U.S. App. Lexis 1681. The order of the United States District Court, Civil Action No. 79-4190 (E.D. Pa. November 8, 2005), is unreported. Copies of the Court of Appeals' and District Court's opinions and orders are provided in the Appendix hereto at App. 1a-10a and App. 11a-12a respectively.

Petitioner's Petition for Rehearing in the Court of Appeals was denied by the Court of Appeals by Order dated February

22, 2007. A copy of that February 22, 2007 Order is also provided in the Appendix at App. 13a-14a.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 25, 2007. A timely petition for rehearing was filed by petitioner Philadelphia Housing Authority on February 8, 2007. The petition for rehearing was denied by order of the Court of Appeals dated February 22, 2007. (App. 13a-14a). This Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## FEDERAL REGULATIONS INVOLVED

Section 982.555 of the United States Department of Housing and Urban Development's regulations (24 C.F.R. § 982.555) governs the right to a hearing for participant families receiving rental assistance from a public housing agency (referred to in the regulations as "a PHA") under the federal Section 8 low-income housing assistance program. Section 982.555 provides in relevant part:

> **§ 982.555 Informal hearing for participant.**
>
> (a) *When hearing is required.* (1) a PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:
>
> (i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.
>
> (ii) A determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.

(iii) A determination of the family unit size under the PHA subsidy standards.

(iv) A determination that a certificate program family is residing in a unit with a larger number of bedrooms than appropriate for the family unit size under the PHA subsidy standards or the PHA determination to deny the family's request for an exception from the standards.

(v) A determination to terminate assistance for a participant family because of the family's action or failure to act (see § 982.552).

(vi) A determination to terminate assistance because the participant family has been absent from the assisted unit for longer than the maximum period permitted under PHA policy and HUD rules.

(2) In the cases described in paragraphs (a) (1) (iv), (v) and (vi) of this section, the PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding HAP contract.

* * *

(c) *Notice to family.* (1) In the cases described in paragraphs (a)(1) (i), (ii) and (iii) of this section, the PHA must notify the family that the family may ask for an explanation of the basis of the PHA determination, and that if the family does not agree with the determination, the family may request an informal hearing on the decision.

(2) In the cases described in paragraphs (a)(1) (iv), (v) and (vi) of this section, the PHA must give the family prompt written notice that the family may request a hearing. The notice must:

—

(i) Contain a brief statement of reasons for the decision,

(ii) State that if the family does not agree with the decision, the family may request an informal hearing on the decision, and

(iii) State the deadline for the family to request an informal hearing.

(d) *Expeditious hearing process.* Where a hearing for a participant family is required under this section, the PHA must proceed with the hearing in a reasonably expeditious manner upon the request of the family.

(e) *Hearing procedures*—(1) *Administrative plan.* The administrative plan must state the PHA procedures for conducting informal hearings for participants.

(2) *Discovery*—(i) *By family.* The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing. The family must be allowed to copy any such document at the family's expense. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.

(ii) *By PHA.* The PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. The PHA must be allowed to copy any such document at the PHA's expense. If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing.

(iii) *Documents.* The term "documents" includes records and regulations.

(3) *Representation of family.* At its own expense, the family may be represented by a lawyer or other representative.

(4) *Hearing officer: Appointment and authority.* (i) The hearing may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.

(ii) The person who conducts the hearing may regulate the conduct of the hearing in accordance with the PHA hearing procedures.

(5) *Evidence.* The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.

(6) *Issuance of decision.* The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family.

* * *

A copy of 24 C.F.R. § 982.555 is reproduced in its entirety in the Appendix at App. 15a-19a.

## STATEMENT OF THE CASE

This is an appeal from a ruling that requires a district court to keep in place in perpetuity a 22-year-old consent decree which regulates a government agency, the Philadelphia Housing Authority ("PHA"). The district court had vacated the Consent Decree on grounds that it had been superseded by

United States Department of Housing and Urban Development ("HUD") regulations, its purpose had been fully satisfied, and it was no longer needed. The Third Circuit decision in this case reversed the district court's vacatur of the Consent Decree, holding that the Consent Decree must remain in effect in perpetuity unless it requires PHA to violate HUD regulations, in order "to hold the parties to their bargain." (App. 10a).

PHA is a public housing agency created by Pennsylvania as an agency of the Commonwealth of Pennsylvania. 35 Pa. Stat. § 1544(a), § 1550. PHA provides subsidized low-income housing and low-income housing assistance in accordance with the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* and HUD regulations promulgated pursuant to that Act.

The Consent Decree regulates hearing procedures which PHA must follow in terminating assistance payments under the federal Section 8 Housing Program, 42 U.S.C. § 1437f. The Section 8 program is a low-income housing program under which participant families live in privately owned housing, and the housing agency, in this case PHA, pays all or part of the participant family's rent. 42 U.S.C. § 1437f. (*See also* App. 2a, 27a).

On November 19, 1979, plaintiff, then a recipient of Section 8 rental assistance from PHA, brought this case as a class action under 42 U.S.C. § 1983 against PHA, and certain officers, directors and employees of PHA. (App. 21a, 24a-26a). Plaintiff alleged that PHA had terminated her Section 8 rental assistance without any prior hearing and that PHA had no constitutionally adequate written procedures providing for a hearing before terminating Section 8 assistance. (App. 24a, 27a-30a). Plaintiff claimed that termination of Section 8 benefits without a prior hearing violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (App. 30a).

On April 27, 1983, the district court approved a Consent Decree specifying an informal hearing procedure for Section 8 recipients to challenge termination from the Section 8 program. (App. 22a, 36a-43a). The Consent Decree required PHA to give notice of a decision to terminate Section 8 assistance stating the reason for termination, and if the tenant requested a hearing, required that PHA provide the tenant an informal hearing before assistance was terminated. (App. 38a-41a).

At the time this action was brought in 1979 and when the Consent Decree was entered in 1983, there were no federal regulations in effect providing any procedural protections to Section 8 recipients when a housing agency terminated their rental assistance. Subsequent to the Consent Decree, however, HUD promulgated regulations providing notice and hearing procedures for termination of Section 8 rental assistance, 24 C.F.R. § 982.555. (App. 15a-19a). The post-Consent Decree HUD regulations require that all public housing agencies provide notice and the opportunity for an informal hearing before termination of Section 8 assistance and specify procedural protections which the notice and pretermination hearing must satisfy. 24 C.F.R. § 982.555.

No contempt or enforcement proceedings were ever brought in this case during the more than 22 years that the Consent Decree was in effect. (App. 5a-6a, 22a). Because the HUD regulations satisfy the Consent Decree's purpose of providing due process protections to Section 8 recipients, PHA, on November 9, 2004, filed a motion to vacate the Consent Decree. (App. 22a). Plaintiff, in response to PHA's motion to vacate, did not make any claim that the HUD regulations were constitutionally inadequate. (App. 51a).

The motion to vacate the Consent Decree was heard by the same judge who had been assigned to this case from its inception and who had approved the Consent Decree. (App. 21a, 36a, 41a, 45a). The district court judge, who was

familiar with the reasons for the Consent Decree, concluded that because of the HUD regulations "there is not now any realistic problem from which the consent decree protects anyone" and found that "the purpose of the consent decree has been satisfied." (App. 12a, 52a). Accordingly, the district court granted PHA's motion to vacate and entered an Order vacating the Consent Decree on November 8, 2005. (App. 11a-12a, 23a).

On January 25, 2007, however, the United States Court of Appeals for the Third Circuit reversed the district court. (App. 1a-10a). The Third Circuit agreed that the subsequent HUD regulations constituted "a significant change in the law." (App. 9a). Despite this fact and the fact that the Consent Decree regulates a government agency, however, the Third Circuit held that the Consent Decree must remain in effect and cannot ever be vacated absent a conflict between the Consent Decree and HUD regulations which would require PHA to violate HUD regulations. (App. 8a-10a). Despite the determination of the judge who presided over this case for its entire 26-year history that "the purpose of the consent decree has been satisfied" (App. 12a), the Third Circuit held that absent a direct and irreconcilable conflict with federal regulations, the Consent Decree must remain in effect in perpetuity "to hold the parties to their bargain." (App. 10a).

## REASONS FOR GRANTING THE PETITION

The Third Circuit's decision reversed a district court for vacating a 22-year old consent decree, notwithstanding that it was undisputed that there had been a significant change of law and there was no longer any need for the decree to protect any federal constitutional or statutory right. The Third Circuit's decision thus conflicts with and violates limitations which this Court has placed on federal courts' regulation of governmental agencies. *See Frew v. Hawkins*, 540 U.S. 431 (2004); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

A second reason for granting certiorari is that the Third Circuit's decision is in conflict with the decision of another circuit, the United States Court of Appeals for the Eleventh Circuit, on the same issue.

The impact of the Third Circuit's decision extends beyond this Consent Decree and these parties. It effectively forces district courts in the Third Circuit to continue court regulation of government agencies even where the district court has found that the purpose of the court supervision has been satisfied and no need for court supervision exists.

The Third Circuit's refusal to follow this Court's precedents demonstrates that the lower courts have not understood this Court's precedents and that further direction from this Court is needed.

### A. The Third Circuit's Decision Requiring A District Court To Regulate A Government Agency In Perpetuity Conflicts With The Decisions Of This Court That Federal Court Regulation Of Government Agencies Must Terminate Once The Need For Court Involvement Has Ceased

A consent decree involving a government agency is not a "bargain" between private parties. This Court has made clear that unnecessary court regulation of state and local officials exceeds the proper role of the federal courts and violates fundamental principles of federalism. *Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004). Where a consent decree regulates a government agency, the presumption is that the decree should *not* remain in effect in perpetuity and that the decree must be terminated as soon as the need which it addressed has been met. *Frew*, 540 U.S. at 442; *Board of Education v. Dowell*, 498 U.S. 237, 248 (1991).

This Court specifically instructed the lower federal courts three years ago in *Frew v. Hawkins* that:

> "If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers.
>
> * * *
>
> *The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials. . . . A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenue and resources.* The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes. . . ."

*Frew*, 540 U.S. at 441-42 (emphasis added).

In *Board of Education v. Dowell*, this Court reversed a court of appeals decision which had barred dissolution of a desegregation decree regulating a school district. This Court explained that a restrictive standard for terminating regulation of a government agency was not consistent with "the allocation of power within our federal system" and that "[s]uch decrees . . . are not intended to operate in perpetuity." 498 U.S. at 248.

Consistent with these fundamental principles of federalism, this Court held in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), that where a consent decree regulates a government agency, requests to eliminate consent decree requirements should be granted if the government agency shows "a significant change in either factual conditions or law." 502 U.S. at 383-84. This Court in *Rufo* recognized that

consent decrees involving government agencies cannot be treated as pure contractual obligations, that despite the partial contractual attributes of consent decrees, a consent decree which regulates a government agency is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." 502 U.S. at 378. This Court further made clear in *Rufo* that the lower courts "should exercise flexibility in considering requests for modification of an institutional reform consent decree." 502 U.S. at 383. *See also Frew*, 540 U.S. at 906.

The decision of the Third Circuit in this case disregarded *Rufo*'s "significant change" standard and has imposed on district courts an extreme position directly contrary to this Court's decisions in *Frew* and *Dowell*. The Third Circuit did not merely permit a consent decree to continue in place. Rather, the Third Circuit has *required* the district court to maintain *in perpetuity* a more than 22-year-old consent decree which the district court found unnecessary and which was undisputedly superseded by subsequent constitutionally adequate regulations, even though the Third Circuit itself recognized that those regulations constituted a "significant change in the law." (App. 9a).

This is not a decision that turned on any factual dispute. The key facts which required vacatur of this Consent Decree were completely undisputed and were accepted as established by the Third Circuit.

There was no dispute that there was a significant change which directly affected the basis for the action and Consent Decree. The foundation of both the underlying action and the Consent Decree was the absence of notice and hearing procedures for Section 8 terminations. (App. 30a, 37a). In 1984, after the Consent Decree, HUD promulgated regulations requiring housing authorities to provide notice and hearings for Section 8 terminations. 49 Fed. Reg. 12215 (March 29, 1984). Proposed regulations had been published after this

action was brought in 1979 but before the Consent Decree was agreed to by the parties in 1982 and approved by the district court in 1983. 47 Fed. Reg. 32169 (July 26, 1982). However, those proposed regulations had not been adopted by HUD, were not in effect at the time of the Consent Decree was entered, and provided no legal protection to the plaintiff class at the time of the Consent Decree. The HUD regulations were not adopted until March 1984 and became effective in May 1984, over one year after the Consent Decree was approved by the district court. 49 Fed. Reg. 12215 (March 29, 1984).

The Third Circuit recognized and agreed that there was "no doubt" that "HUD's final regulations constituted a significant change in the law." (App. 9a). There was, moreover, no dispute that the HUD Section 8 hearing regulations, 24 C.F.R. § 982.555, fully satisfy constitutional due process requirements and provide the due process protection which plaintiff sought in this action.

The HUD regulations require that local public housing agencies, including PHA, give Section 8 recipients notice of termination of Section 8 benefits, stating the reason for the termination and advising them of their right to a hearing on the termination. 24 C.F.R. § 982.555(a)(1)(v),(vi), § 982.555(c)(2). The HUD regulations also require that the hearing be offered and provided, if timely requested, before termination of those benefits. 24 C.F.R. § 982.555(a)(2). The regulations give the participant the opportunity to examine housing authority documents before the hearing, 24 C.F.R. § 982.555(e)(2)(i); the right to be represented by counsel or another representative, 24 C.F.R. § 982.555(e)(3); and the right to present evidence and question witnesses at the hearing. 24 C.F.R. § 982.555(e)(5). The HUD regulations further ensure that the hearing officer cannot have made or approved the termination decision and cannot be a subordinate of a person who made or approved the termination. 24

C.F.R. § 982.555(e)(4)(i). The hearing officer is required to give the participant a written decision stating the reasons for the decision. 24 C.F.R. § 982.555(e)(6).

These HUD regulations have been held sufficient to protect the constitutional due process rights of Section 8 participants. *Basham v. Freda*, 805 F. Supp. 930, 933-34 (M.D. Fla. 1992), *aff'd without op.*, 985 F.2d 579 (11th Cir. 1993); *Ellis v. Ritchie*, 803 F. Supp. 1097, 1105-06 (E.D. Va. 1992); *see also Vandermark v. Housing Authority of City of York*, 663 F.2d 436, 442 (3d Cir. 1981) (no due process violation where Section 8 applicant was given an opportunity to review documents and to participate in a hearing). Indeed, plaintiff admitted that the HUD regulations are sufficient to protect Section 8 recipients' constitutional rights. (App. 51a).

In addition, there was no claim or evidence of any violation of the Consent Decree or of the Section 8 participants' due process rights which could support any need for further court regulation. In the more than 22-year life of the Consent Decree there was not a single contempt proceeding or claim made of noncompliance. (App. 5a-6a). The Third Circuit specifically conceded in its opinion that "no one ever brought contempt or enforcement proceedings, and it appears that the PHA continued to perform its obligations under the decree." (App. 5a-6a).

The district court, based on these facts, concluded that the purpose of the Consent Decree had been fulfilled and that there was no longer any need for a court decree to protect the plaintiff class's rights. (App. 11a-12a). The Third Circuit did not find any error in the district court's determination that the Consent Decree was no longer needed to protect the plaintiff's constitutional rights. Instead, it held that the district court could not vacate the decree because the Consent Decree "provides greater and more specific protections" which must be enforced in perpetuity "to hold the parties to their bargain." (App. 8a-10a).

In short, the Third Circuit has required that successor administrators of a government agency be contractually bound forever to specific policies unconnected to any need to protect any federal right. That ruling is antithetical to this Court's directives in *Frew* and *Dowell*. The violation of this Court's directives is particularly glaring, as nothing in the Consent Decree provides that it is to remain in effect forever and the district court found that there was no agreement of the parties as to the decree's duration or that it would remain in effect for anything more than a reasonable time. (App. 66a-68a). The language in the Consent Decree addressing conflict with future HUD regulations did not state that the Consent Decree could not be vacated in any other circumstance. Rather, it dealt with the specific problem that PHA could not agree to anything which could place it in a position of having to violate HUD regulations. (App. 40a-41a).

Indeed, the Third Circuit's emphasis on protecting the parties' "bargain" is peculiarly inappropriate because the parties who brought the lawsuit and compromised their claims are not even the same people who seek to maintain and currently benefit from the decree. The only individuals who gave up claims in exchange for the Consent Decree's provisions were persons receiving Section 8 assistance in 1983, 24 years ago. It is unclear that any of those individuals are even beneficiaries of this Consent Decree at this time. Instead, the "greater and more specific protections" which go beyond any federal rights are benefiting only a different group, current Section 8 participants, the vast majority whom undoubtedly were not members of the class at the time of the "bargain" and gave up no rights in exchange for the specific provisions of the Consent Decree.

### B. The Third Circuit's Decision Requiring A District Court To Keep In Place A Consent Decree Which Has Been Superseded By Federal Regulations Conflicts With A Decision Of The Eleventh Circuit On The Same Question

The Eleventh Circuit Court of Appeals, in *Hodge v. Department of Housing & Urban Development*, 862 F.2d 859 (11th Cir. 1989), addressed virtually the same situation as here and reached the opposite conclusion from the Third Circuit decision in this case. In *Hodge*, a class action was brought against a public housing agency asserting constitutional claims for violations of procedural due process in the agency's handling of disputes with its tenants. 862 F.2d at 860. The action was brought in 1968, before HUD promulgated formal regulations providing grievance procedures. 862 F.2d at 860. After the entry of the *Hodge* consent decree, HUD promulgated grievance regulations, and Congress in 1983 enacted a statute requiring and providing for administrative grievance procedures. 862 F.2d at 860-61.

The Eleventh Circuit held that such federal regulatory changes were grounds for vacating the consent decree. 862 F.2d at 865. The Eleventh Circuit in *Hodge* reversed the district court's ruling vacating the consent decree on the grounds that the court was required to, and failed to hold an evidentiary hearing on the motion to dissolve the injunction. 862 F.2d at 861. The court, however, analyzed whether those subsequent regulations addressed the same procedural due process concerns which were the basis for the consent decree and specifically held that the district court should vacate the consent decree, provided that the HUD regulations satisfied due process requirements. 862 F.2d at 865. The Eleventh Circuit directed:

> "On remand, the district court should first determine whether compliance with the federal laws necessarily satisfies due process. If so, *the court can dissolve the*

> *injunction, because in that event the decree merely compels an outcome consistent with the one demanded by the federal statute and regulations.* That the County might alter its grievance procedure following dissolution of the injunction is not significant, as long as any regulations adopted by the County conform to the requirements of the federal laws and procedural due process. Congress and HUD have permitted PHAs [public housing agencies] some discretion in establishing such procedures, and the Tenants cannot insist on additional or unique protection of their rights absent constitutional fault."

862 F.2d at 865 (emphasis added).

Although *Hodge* was decided three years before *Rufo*, the Eleventh Circuit in *Hodge* anticipated this Court's decision in *Rufo*. The standard for modification of a consent decree which the *Hodge* court applied was whether there was a change in the relevant law, 862 F.2d at 863-65 & n.5, essentially the same standard as the *Rufo* standard of "a significant change either in factual conditions or in law." 502 U.S. at 384. Indeed, the decisions on which *Hodge* relied, *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied* 464 U.S. 915 (1983), and *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984), were cited by this Court with approval in *Rufo*. 502 U.S. at 377 n.4, 380-81. Accordingly, *Hodge*'s holding, that subsequent enactment or promulgation of constitutionally adequate procedures is a significant change in law which supports the vacatur of a consent decree, has remained good law after *Rufo*. *See, e.g., Lynch v. Sessions*, 942 F.Supp. 1419, 1426-27 (N.D. Ala. 1996)

This case is indistinguishable from *Hodge*. The Third Circuit's ruling that a district court cannot vacate a consent decree in light of subsequent HUD regulations addressing the same need is in conflict with the Eleventh Circuit's holding in

*Hodge* that such subsequent regulations eliminate the need for judicial regulation and supervision and require vacatur.

Indeed, the Third Circuit's decision here is also in conflict with another decision of that court itself. In *Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir. 2003), this question was addressed by a different panel of the Third Circuit, which included Justice Samuel Alito prior to his appointment to this Court. The unanimous *Brown* panel, including Justice Alito, held that vacatur of a public housing due process consent decree is appropriate where subsequent federal regulations have been promulgated which provide procedural protections for the same situation as the consent decree. 350 F.3d at 348 n.6. The unanimous *Brown* panel held that in this very type of situation, the promulgation of federal grievance hearing regulations "significantly change[d] the relevant due process landscape (originally sought to be cured by the Consent Decree)," and that, as a result, "the Consent Decree no longer had force or utility, and there was no reason for the Consent Decree to remain operative." 350 F.3d at 348 n.6.

Beyond these conflicts, guidance from this Court is particularly important because other courts of appeals have expressed uncertainty as to the proper legal standard for vacating consent decrees. Both the First Circuit and the Fourth Circuit have specifically noted that it is unclear whether vacatur of consent decrees is governed by the standards for termination of court supervision set forth by this Court in *Dowell*, by the standards for modification of consent decrees set forth by this Court in *Rufo* or by both the *Dowell* and *Rufo* standards. *See Alexander v. Britt*, 89 F.3d 194, 197-200 (4th Cir. 1996) (noting uncertainty over the proper standard but leaving the issue unresolved because the court found that neither standard was satisfied); *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286, 291-93 (1st Cir. 1993) (same).

### C. The Negative Impact Of The Third Circuit's Decision On State And Local Governments' Ability To Exercise Their Powers And Responsibilities Is Substantial

The fact that the Third Circuit's decision is unpublished and non-precedential does not negate its impact. Both the Federal Rules of Appellate Procedure and the Third Circuit's rules permit parties in other cases to use and cite this opinion. *See* Fed. R. App. P. 32.1(a); Third Cir. L.A.R. 28.3; Third Cir. Internal Operating Proc. 5.3, 5.7. The opinion, while not formally reported in a published volume, is widely available. It is publicly available on the court's website, Third Cir. Internal Operating Proc. 5.3, and is reported on both the Lexis and Westlaw electronic systems. *See* 2007 U.S. App. Lexis 1681 and 2007 WL 186764.

The only effect of the decision's non-precedential status is that the Third Circuit itself will not consider itself bound by this decision in the future. Third Cir. Internal Operating Proc. 5.7. Its impact on district courts, however, will likely be substantial. The decision reversed a district court and prohibited it from vacating a consent decree. Such a reversal, despite its "non-precedential" status, will have a chilling effect on district courts in the Third Circuit and deter the district courts from terminating unwarranted and unnecessary federal court regulation of state and local agencies.

Moreover, the negative impact of the decision on government powers and authority is substantial. The fact that this particular Consent Decree does not require active court involvement in the day-to-day administration of PHA does not make its interference minor. A state or local government "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenue and resources." *Frew*, 540 U.S. at 442. The Third Circuit decision binds PHA inflexibly to a procedure set 24 years ago. The Third Circuit decision deprives PHA of its

right and ability to make policy judgments to best serve the needs of Section 8 program participants and to best allocate its limited resources. PHA has now been permanently locked in by the Third Circuit to a specified procedure, with any change to that procedure subject to the veto of outside parties (class action lawyers) who are neither elected nor appointed by any governmental or elected body and who are not answerable to any electorate or elected body.

The "greater and more specific protections" noted by the Third Circuit (App. 8a) adversely affect policy decisions on the allocation of government resources. The Consent Decree's requirement of "30-days notice prior to termination" (App. 5a) does not provide any added due process protection against erroneous termination of benefits. The Consent Decree does not give Section 8 recipients 30 days to contest erroneous terminations—instead, it requires the recipient to request a hearing within a much shorter 10-day period. (App. 38a) (notice of termination must notify of "the right of the recipient to request, within ten (10) days, an informal hearing"). The 10-day period to request a hearing is not significantly different from the protections afforded by the HUD regulations. The HUD regulations require that Section 8 participants be given notice of a time period to request a hearing and also require that the termination not occur until after the hearing, if such a hearing is requested. 24 C.F.R. § 982.555(a)(2),(c)(2).

Since the HUD regulations require that the hearing be provided before termination of assistance and the Consent Decree gives only 10, not 30, days to request a hearing, the 30-day notice provision does not give Section 8 participants any additional opportunity to contest the termination of assistance, or any additional protection against erroneous termination. Instead, it only delays valid terminations of assistance where the participant does not dispute that the termination is proper. Whether limited housing assistance funds should be

expended on continuing payments to persons who have been properly terminated rather than used to meet other housing needs is a policy decision on the allocation of resources which belongs in the hands of the government agency, PHA, not in the hands of the federal courts or class action lawyers. *See Frew*, 540 U.S. at 441-42.

The Consent Decree's provision that "persons 'involved in the day to day administration of the [Section 8] program' may not be hearing officers," likewise interferes with significant policy decisions. (App. 5a) (quoting Consent Decree). In promulgating its regulations, HUD considered and expressly rejected this type of prohibition because it was unnecessary and "could be detrimental to the section 8 participants, for example by depriving the hearing process of persons knowledgeable of technical requirements of the housing subsidy program, and by diverting scarce program resources to hire outside persons as hearing officers." 49 Fed. Reg. 12215, 12229-30 (March 29, 1984). Instead, HUD chose to insure impartiality by requiring that the hearing officer not have been involved in the decision in question and not be a subordinate of the decision-maker. 49 Fed. Reg. 12215, 12229-30 (March 29, 1984); 24 C.F.R. § 982.555(e)(4)(i). Forcing PHA to be perpetually bound to a requirement rejected by HUD as undesirable not only infringes PHA's authority, but conflicts with HUD's policy decision.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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